

A **MASCOM (M) SDN BHD & ANOR**
v.
KAMAWANG ENTERPRISE SDN BHD & ANOR

B COURT OF APPEAL, PUTRAJAYA
DENIS ONG JCA
ABDUL AZIZ MOHAMAD JCA
TENGKU BAHARUDIN SHAH JCA
[CIVIL APPEAL NOS: S-02-398-2001 & S-02-239-2003]
C 28 SEPTEMBER 2006

CIVIL PROCEDURE: *Accounts - Summary order for account - Allegations of fraud - Whether a preliminary issue to be tried - Rules of the High Court 1980, O. 43 r. 1(3)*

D **PARTNERSHIP:** *Accounts - Right to accounts - Whether duty of partners to render true accounts - Partnership Act 1961, s. 30*

PARTNERSHIP: *Liability of partners - Partners' claim for share in profits - Order for payment - Whether justified*

E There were two appeals before this court. The facts showed that the 1st appellant and the respondents formed a partnership called SMK Engineering ('SMKE') for the sole purpose of undertaking a construction project for the Federal Government. The 1st
F appellant, Mascom, was appointed the managing partner for the project. The 2nd appellant was the managing director of the 1st appellant. The 1st appellant entered into a joint-venture agreement ('JVA') with SMKE to provide management expertise and project
G financing for the project. By virtue of cl. 7.1 of the JVA, 28.7% of the contract sum was apportioned to SMKE whilst 71.3% was apportioned to the 1st appellant. It was arranged between the parties that any contract sum paid to SMKE by the government would first go into the SMKE Account from which the 71.3%
H 28.7% would remain in the SMKE Account. According to cl. 7.4 of the JVA, the 1st appellant was entitled to deduct RM4,300,000 in 24 instalments for its absolute use and the balance was to be used for paying the expenses and costs borne by the 1st appellant for the project. It was also agreed that upon completion of the
I project, any balance should be divided equally among the partners and any shortfall should also be borne equally by them.

The respondents subsequently filed a writ action against the appellants for, amongst others, the dissolution of the SMKE partnership. They then applied, under O. 43 Rules of the High Court 1980 ('RHC'), for an order for the taking of account of the SMKE Account and the Mascom Account. They also applied for an injunction to preserve the monies in the accounts and for the appointment of a receiver for the SMKE partnership. The Senior Assistant Registrar ('SAR') granted all their prayers. On appeal, the judge affirmed the SAR's order for the taking of account of the SMKE Account and the Mascom Account but omitted the others. That led to the first appeal by the appellants herein. After the documents and accounts ordered to be filed had been filed by the appellants, the respondents applied for various orders including for the payment of a sum of RM2,230,000 each from the SMKE Account. The judge allowed the application. Hence, the second appeal by the appellants.

Held (dismissing the appeals)

Per Abdul Aziz Mohamad JCA delivering the judgment of the court:

- (1) So long as there was a partnership, the respondents were entitled to an account by virtue of s. 30 of the Partnership Act 1961. There was no merit in the appellants' submission that the learned judge, by virtue of O. 43 r. 1(3) RHC, should not have ordered the taking of account as there was a preliminary question to be tried on the allegations of fraud. This was because the claim to an account was not founded on those allegations but on the duty of partners to render true accounts. That was the only issue in the first appeal. As such the first appeal was dismissed.
- (2) The total net profit that accrued to the partners of SMKE was RM19,308,943. That divided equally among the three partners resulted in a sum of RM6,436,314.30 each. Since RM4,038,185 and RM4,023,756 was already disbursed to the respondents respectively, the amounts remaining due to them were RM2,398,123.30 and RM2,412,558.30 respectively. The sum of RM10,335,502 drawn by the 1st appellant from the SMKE Account showed that it overdraw by RM3,899,187.70 since it was entitled to only RM6,436,314.30.

- A **(3)** The sum of RM2,476,019, whether withdrawn or advanced by
the 1st appellant into the SMKE Account, did not bind the
respondents and so could not be set up against them. According to cl 11.2.2 of the Partnership Deed, the
B unanimous approval of all members of the management
committee (which comprised a representative of each of the
three partners) was required. Here, there was no such
unanimous approval. Therefore, the 1st appellant made the
advance or accepted it in breach of the Partnership Deed. In
any case, if the advance could be taken into account, it would
C only reduce the 1st appellant's overdrawing of
RM3,899,187.70 to RM1,423,168.70. That did not have any
effect on the balance due to the respondents.
- D **(4)** Clause 7.4(b) of the JVA that provided that division of monies
could only be done upon completion of the project concerned
only the Mascom Account. Payment was ordered by the
learned judge to be made from the SMKE Account. The
SMKE account was the account into which the clean profits
of the partnership were to be kept. The Mascom Account
E was the account from which the expenses and costs payable
by the 1st appellant for the project were to be paid. Hence,
cl. 7.4(b) was not applicable. Even if there was such a
provision for the SMKE account, since the parties drew on it
before the completion of the project, that provision was
F waived by common consent.
- G **(5)** The appellants' submission that payment ordered to the
respondents should not be based on the accounts as at 31
August 2000 when the project was completed on 9 November
2000, had no merit. It was the appellants themselves who had
filed the accounts up to 31 August 2000. In fact the
respondents' summons-in-chambers seeking payment was filed
on 20 August 2001, long after the completion of the project.
The 1st appellant, as the managing partner, had control of the
accounts and so had ample time to produce an up to date
H account before the respondents' application came to be heard.
- I **(6)** The Detailed Income Statement for the year ended 30 April
2002 for SMKE showing a loss of RM912,640 reflected only
one year's loss. The proper thing to do was to look at the
cumulative state of the account over the years that the

appellants did themselves. That showed a profit of RM17,209,791 as at 30 April 2002. As such, the appellants' submission that no payment of profit could be paid to the respondents based on the said loss could not be accepted.

- (7) Appendix 1 submitted by the appellants to prove that the respondents, instead of having any balance due to them had in fact overdrawn by about RM450,000 each, was unreliable. There it was shown that the 1st appellant was credited with a sum of RM4,300,000 said to be for its absolute use and the respondents were debited with a sum of RM2,150,000 each as contribution to that sum. Although the 1st appellant was indeed entitled to the sum of RM4,300,000 as per cl. 7.4(a) of the JVA, that entitlement was only to be taken from the 71.3% paid into the Mascom Account and not from the 28.7% paid into the SMKE Account.

Bahasa Malaysia translation of headnotes

Terdapat dua rayuan di hadapan mahkamah semasa. Fakta menunjukkan bahawa perayu pertama dan responden-responden telah menubuhkan satu perkongsian yang dipanggil SMK Engineering ('SMKE') khusus untuk melaksanakan satu projek pembangunan untuk Kerajaan Persekutuan. Perayu pertama, Mascom, telah dilantik sebagai pekongsi pengurus projek. Perayu kedua adalah pengarah urusan perayu pertama. Perayu pertama kemudian memeterai satu perjanjian usahasama ('JVA') dengan SMKE bagi menyediakan pengurusan pakar dan pembiayaan bagi projek. Berdasarkan fasal 7.1 JVA, 28.7% dari jumlah kontrak diperuntukkan kepada SMKE sementara 71.3% diagihkan kepada perayu pertama. Menjadi kesepakatan pihak-pihak bahawa apa-apa jumlah kontrak yang dibayar oleh kerajaan akan dimasukkan dahulu ke Akaun SMKE dan kemudian sebanyak 71.3% dari jumlah itu akan dipindahkan ke Akaun perayu pertama. Baki 28.7% akan terus berada dalam Akaun SMKE. Menurut fasal 7.4 JVA, perayu pertama berhak untuk menolak RM4,300,000 melalui 24 ansuran untuk kegunaan mutlakanya sementara bakinya akan digunakan untuk membayar perbelanjaan dan kos yang ditanggung oleh perayu pertama dalam projek. Juga dipersetujui bahawa apabila projek telah siap, apa-apa baki hendaklah dibahagi sama rata di antara pekongsi, dan begitu juga dengan kerugian yang perlu ditanggung bersama.

- A Responden-responden telah memfailkan tindakan writ terhadap perayu-perayu, antara lain, bagi membubarkan perkongsian SMKE. Mereka kemudian memohon perintah untuk memperakaun Akaun SMKE dan Akaun Mascom di bawah A. 43 Kaedah-Kaedah Mahkamah Tinggi 1980 ('KMT'). Mereka juga memohon injunksi
- B bagi mengekalkan wang di akaun serta bagi melantik penerima untuk SMKE. Penolong Kanan Pendaftar ('SAR') telah membenarkan semua permohonan responden-responden. Di rayuan, hakim mengesahkan perintah memperakaun Akaun SMKE dan Akaun Mascom tetapi meninggalkan perintah-perintah lain. Ini
- C membawa kepada rayuan pertama di sini oleh perayu-perayu. Selepas segala dokumen dan akaun yang diperintah supaya difail difailkan oleh perayu-perayu, responden-responden memohon beberapa perintah lagi, termasuk bagi pembayaran sejumlah RM2,230,000 setiap satunya dari Akaun SMKE. Permohonan ini
- D dibenarkan oleh hakim, sekaligus mengakibatkan rayuan kedua oleh perayu-perayu.

Diputuskan (menolak rayuan-rayuan)

Oleh Abdul Aziz Mohamad HMR menyampaikan penghakiman mahkamah:

- E
- (1) Selagi perkongsian masih wujud, responden-responden berhak kepada akaunnya berdasarkan s. 30 Akta Perkongsian 1961. Tidak ada merit pada hujah perayu-perayu bahawa yang arif hakim, berdasarkan A. 43 k. 1(3) KMT, tidak seharusnya
- F memerintahkan pengambilan akaun disebabkan wujud persoalan awalan yang perlu dibicarakan atas dakwaan fraud. Ini kerana tuntutan kepada akaun tidak dilandaskan kepada dakwaan-dakwaan tersebut tetapi atas tanggungjawab rakan kongsi
- G untuk memberikan akaun yang betul. Itulah satu-satunya isu yang berbangkit dalam rayuan pertama. Rayuan dengan itu adalah ditolak.
- (2) Keuntungan bersih yang diperoleh oleh pekongsi-pekongsi SMKE adalah RM19,308,943. Dibahagi kepada tiga rakan
- H kongsi ia menghasilkan RM6,436,314.30 kepada setiap seorang. Oleh kerana RM4,038,185 dan RM4,023,756 telah pun dibayar kepada masing-masing responden, jumlah baki yang perlu dibayar kepada mereka adalah RM2,398,123.30 dan RM2,412,558.30 masing-masingnya. Jumlah RM10,335,502
- I yang dikeluarkan oleh perayu pertama dari Akaun SMKE menunjukkan bahawa ia telah terlebih keluar sebanyak RM3,899,187.70, kerana ia hanya berhak kepada RM6,436,314.30.

- (3) Jumlah sebanyak RM2,476,019, sama ada dikeluarkan atau dimasukkan ke Akaun SMKE oleh perayu pertama, tidak mengikat responden-responden dan kerana itu tidak boleh dituntut dari mereka. Menurut fasal 11.2.2 Suratikatan Perkongsian, persetujuan sebulat suara kesemua ahli jawatankuasa pengurusan (yang mengandungi seorang wakil bagi setiap pekongsi) adalah diperlukan. Di sini, tiada persetujuan sedemikian diperolehi. Oleh itu, perayu pertama telah membuat pembayaran atau telah menerimanya secara yang melanggar Suratikatan Perkongsian. Apapun, jika pembayaran tersebut boleh diambilkira, ia hanya akan mengurangkan jumlah pengeluaran lebih oleh perayu pertama dari RM3,899,187.70 kepada RM1,423,168.70. Ia tidak mempunyai apa-apa kesan terhadap baki yang kena dibayar kepada responden-responden.
- (4) Fasal 7.4(b) JVA yang memperuntukkan bahawa pengagihan wang hanya boleh dibuat apabila projek siap hanya menyangkut Akaun Mascom. Bayaran yang diperintah dibayar oleh yang arif hakim adalah dari Akaun SMKE. Akaun SMKE adalah akaun di mana keuntungan bersih perkongsian harus disimpan. Akaun Mascom pula adalah akaun yang perlu digunakan oleh perayu pertama bagi membayar kos dan perbelanjaan-perbelanjaan projek. Oleh yang demikian, fasal 7.4(b) adalah tidak terpakai. Jikapun terdapat peruntukan sebegitu bagi Akaun SMKE, oleh kerana pihak-pihak telah membuat pengeluaran sebelum projek disiapkan, peruntukan berkenaan telah diketepikan melalui persetujuan bersama.
- (5) Hujah perayu-perayu bahawa bayaran yang diperintah dibayar kepada responden-responden tidak harus didasarkan kepada akaun-akaun setakat 31 Ogos 2000 disebabkan projek hanya siap pada 9 November 2000, tidak bermerit. Ini kerana perayu-perayu sendiri yang memfailkan akaun-akaun setakat 31 Ogos 2000. Hakikatnya, permohonan saman-dalam-kamar responden untuk pembayaran difailkan pada 20 Ogos 2001, lama selepas projek disiapkan. Perayu pertama, selaku pekongsi yang mengurus, mempunyai kawalan terhadap akaun dan oleh itu mempunyai cukup masa untuk mengemukakan akaun mutakhir sebelum permohonan responden-responden didengar.

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- A (6) Penyata Pendapatan Terperinci SMKE bagi tahun berakhir 30 April 2002 yang menunjukkan kerugian sebanyak RM912,640 hanya mencerminkan kerugian bagi satu tahun. Cara yang betul adalah dengan melihat kepada akaun-akaun bertindih yang selama ini dibuat oleh perayu-perayu sendiri.
- B Ianya menunjukkan keuntungan sebanyak RM17,209,791 setakat 30 April 2002. Dengan itu, hujah perayu-perayu bahawa tiada bayaran keuntungan boleh dibuat kepada responden-responden berdasarkan kerugian tersebut tidak boleh diterima.
- C (7) Appendix 1 yang dikemukakan oleh perayu-perayu bagi membuktikan bahawa responden-responden, jauh dari mempunyai baki yang harus dibayar kepada mereka, sebenarnya telah membuat lebihan pengeluaran sebanyak RM450,000 masing-masing, adalah tidak menyakinkan. Ditunjukkan di situ bahawa perayu pertama telah dikreditkan dengan jumlah RM4,300,000 yang dikatakan untuk kegunaan mutlaknya, sementara responden-responden telah didebitkan dengan jumlah RM2,150,000 masing-masing sebagai sumbangan kepada jumlah tersebut. Walaupun perayu pertama memang berhak kepada jumlah RM4,300,000 itu mengikut fasal 7.4(a) JVA, hak tersebut harus datang dari 71.3% yang dibayar ke Akaun Mascom dan bukannya dari 28.7% yang dibayar ke Akaun SMKE.
- F **Legislation referred to:**
Courts of Judicature Act 1964, s. 69(5)
Partnership Act 1961, s. 30
Rules of the Court of Appeal 1994, r. 7(5)
Rules of the High Court 1980, O. 43 rr. 1(3), 2, 3, 4
- G **Other source(s) referred to:**
Lindley & Banks on Partnership, 14th edn, p 264

For the appellants - Azhar Azizan Harun (Kaushalya Rajathurai with him); M/s Sulong & Sinsua
- H *For the 1st respondent - Kong Hong Ming; M/s Lee & Kong*
For the Department of Insolvency (Liquidator) - Sairah Yahya; SFC

[Appeal from High Court Sabah & Sarawak, Kota Kinabalu; Civil Case No: K22-121-2000]
- I *Reported by Usha Thiagarajah*

JUDGMENT**A****Abdul Aziz Mohamad JCA:**

[1] By a Partnership Deed dated 3 March 1997 executed by the first appellant (“Mascom”), the first respondent (“Kamawang”) and the second respondent (“Seri Pagi”), a partnership by the name of SMK Engineering (“SMKE”) and comprising those three companies was formed for the sole purpose of undertaking the construction of a road in Sabah for the Federal Government (“the project”), with Mascom as the managing partner. The second appellant (“Sinsua”) was the managing director of Mascom. The project was awarded to SMKE.

B**C**

[2] On 21 November 1997 SMKE (which included Mascom) entered into a joint-venture agreement with Mascom (“the JVA”), whereby Mascom was to provide management expertise and project financing for the project and ensure its successful completion. By cl. 7.1 of the JVA, 28.7% of the contract sum, which was RM71,828,455, was apportioned to SMKE and 71.3% to Mascom. Two accounts were opened at the OCBC Bank in Kota Kinabalu. One was the joint-venture account in the name of SMKE (“the SMKE Account”). The other was an account in the name of Mascom (“the Mascom Account”). By arrangement between the three partners of SMKE and the bank, any contract sum paid to SMKE by the Government would first go into the SMKE Account, from which 71.3% would then be transferred to the Mascom Account, the balance 28.7% to remain in the SMKE Account.

D**E****F**

[3] As for the moneys in the Mascom Account, according to cl. 7.4 of the JVA, Mascom was entitled to deduct RM4,300,000 in twenty-four instalments for its absolute use and the balance was to be used for paying the expenses and costs that Mascom had to pay for the project, and, upon completion of the project, any balance shall be divided equally among the partners and any shortfall shall be borne equally by them.

G**H**

[4] On 12 July 2000 Kamawang and Seri Pagi, the respondents, filed a writ action against Mascom and Sinsua, the appellants, seeking, among other things, the dissolution of the partnership of SMKE and claiming, in effect, for an account of the SMKE Account and the Mascom Account.

I

- A** **[5]** On 14 September 2000 Kamawang and Seri Pagi applied by a summons in chambers in the action, under O. 43 rr. 1, 2, 3 of the Rules of the High Court 1980, for an order to the effect that an account be taken of the SMKE Account and the Mascom Account and for ancillary orders such as orders for the filing of
- B** accounts and documents by Mascom and Sinsua. They also applied for an injunction to preserve the moneys in the accounts and for the approval of a receiver for the SMKE partnership. The senior assistant registrar granted all the prayers. On appeal to the judge in chambers, Charles Ho J on 2 May 2001 varied the order
- C** of the senior assistant registrar by omitting the injunction and the approval of a receiver, thereby impliedly upholding the other orders. Appeal No. S 02-398-2001 (“the first appeal”) was the appeal of Mascom and Sinsua against the decision of Charles Ho J.
- D** **[6]** After the documents and accounts that were ordered to be filed had been filed by Mascom and Sinsua, on 20 August 2001 Kamawang and Seri Pagi applied by a summons in chambers in the action, under O. 43 rr. 1, 2, 3, 4, for various orders, including
- E** orders for the payment from the SMKE Account to Kamawang and Seri Pagi of a sum of RM2,230,000 each. On 14 March 2003 Ian Chin J granted the payment orders. Appeal No. S 02-239-2003 (“the second appeal”) was the appeal of Mascom and Sinsua against that decision of Ian Chin J. In his judgment the learned
- F** judge also dealt with the Mascom Account, in regard to which there was a controversy as to whether certain sums taken out by Mascom and Sinsua from the account were genuine expenses, but he ordered a trial to determine whether certain items in the Mascom Account should be falsified. The second appeal,
- G** therefore, concerned the SMKE Account and had nothing to do with the Mascom Account.
- [7]** The two appeals were heard together. We dismissed the appeals.
- H** **[8]** In his oral submission, the appellants’ counsel informed the court that he was going only on three grounds and that he abandoned all other grounds. One ground was for the first appeal, and that was in paragraph 2 of the memorandum of appeal for the first appeal. It concerned certain allegations of fraud in the
- I** amended statement of claim of Kamawang and Seri Pagi, the respondents. The other two grounds were for the second appeal, and these were in paras. 11 and 12 of the supplementary

memorandum of appeal for the second appeal. Those grounds concerned, respectively, a sum of RM2,476,019 and certain “triable issues involving the accounts”.

The Allegations Of Fraud

[9] Up to, and including, para. 13 of the amended statement of claim, the averments were about the Partnership Deed and the JVA and their essential provisions, to highlight the partners’ duties to each other and their right to the partnership assets. Then in paras. 15, 16 and 17 the respondents mentioned about the opening in March 1998 by the three partners in SMKE’s name of two deposit accounts with the Standard Chartered Bank, Kota Kinabalu, of their paying two sums totalling RM2,520,000 into the two accounts, of withdrawals allegedly made by Mascom without the respondents’ knowledge or consent from those two accounts in July 1999, and of the appellants’ failure to account for the withdrawals despite a demand by the respondents. Those two accounts were apparently other than the SMKE Account and the Mascom Account. It was in paras. 18 and 19 that the respondents averred the making of demands on Mascom on various dates in the year 2000 to disclose the SMKE Account and the Mascom Account and Mascom’s failure to do so. Then in para. 20, the last paragraph of factual averment, the respondents “further, or alternatively” averred that the appellants had been fraudulent in managing the affairs of the SMKE partnership and the joint venture. The particulars of fraud related to matters other than the SMKE Account and the Mascom Account but included by adoptive reference the averments in paras. 15 to 19.

[10] According to O. 43 r. 1(3), the court may not order the taking of an account if satisfied that there is some preliminary question to be tried. The appellants’ counsel submitted that as there was a preliminary question to be tried as to the allegations of fraud, Charles Ho J ought not to have ordered the taking of account.

[11] Although in their affidavit in support of their application for the taking of account the respondents had included the allegations of fraud as in the amended statement of claim, in his submission before Charles Ho J their counsel said that their case for an account depended on the existence of a partnership and the duty of partners to render true accounts, which duty is spelt out in

- A** s. 30 of the Partnership Act 1961, and did not depend on the allegations of fraud, which were allegations that were pertinent to the prayers for dissolution of the partnership and for the approval of a receiver; and that therefore, as the appellants had been duly notified, the respondents would not be referring to the allegations
- B** of fraud. Before us the respondents' counsel likewise submitted as to the basis of the respondents' case for an account.

[12] It is not clear whether the respondents had taken the same stand before the senior assistant registrar, but in his judgment

- C** Charles Ho J said:

The main, if not the sole ground relied upon by the Defendants to oppose the Plaintiff's application for inspection and for accounts to be taken off [sic] the Mascom Account was that there was no partnership as defined under sections 3 and 4 of the Partnership Act, 1961. However, the Senior Assistant Registrar found, based on the partnership deed and the JVA ... there existed a partnership between the Plaintiffs and the 1st Defendants.

Charles Ho J agreed with the Senior Assistant Registrar.

- E** **[13]** It appeared, therefore, that Charles Ho J, and probably the senior assistant registrar too, did not treat the allegations of fraud as a live issue since the respondents grounded their claim for an account only on the duty of partners to render true accounts. But in the appeal the appellants' counsel still clung to the allegations
- F** of fraud as a preliminary question to be tried that prevented the taking of account until it was tried.

[14] We agreed with the respondents' counsel that so long as there was a partnership, which in the appeal the appellants' counsel conceded the existence of, the respondents were entitled to an account by virtue of s. 30 of the Partnership Act 1961 and that the allegations of fraud were not a preliminary question to be tried before the taking of account could be ordered because the claim to an account was not founded on those allegations but on the duty of partners in any event to render true accounts. That was the only issue in the first appeal. As the appellants failed on that issue, the first appeal was dismissed.

- I**

The Sum Of RM2,476,019**A**

[15] This issue related to the second appeal, which was the appeal against the orders of payment made by Ian Chin J. To explain how the question of the sum of RM2,476,109 arose, it is necessary to set out Ian Chin J's findings that formed the basis for his orders of payment.

B

[16] In para. 9.2 of their affidavit dated 20 August 2001 the respondents averred that on the basis of the statements of account filed by the appellants (which were made up to 31 August 2000) the net profit that accrued to the partners of SMKE should be RM19,308,943, based on a total income of RM70,879,071 from the Project for the period up to 31 August 2000. In para. 9.3 the respondents averred that, on the basis of those statements of account, out of that net profit RM4,038,185 had been disbursed to Kamawang and RM4,023,756 had been disbursed to Seri Pagi. In para. 9.4 the respondents set out a table that worked out the balance due and payable to them as at 31 August 2000. The calculation may easily be explained. The total net profit of RM19,308,943 was divided by three, resulting in a sum of RM6,436,314.30 as the share of each of the three partners. Since RM4,038,185 and RM4,023,756 appeared in the accounts as having been disbursed to Kamawang and Seri Pagi respectively, the amounts remaining due to them respectively were RM2,398,123.30 and RM2,412,558.30. Of those sums, each of them, by their summons in chambers of 20 August 2001, sought payment of RM2,230,000.

C**D****E****F**

[17] In the table in the said para. 9.4, the respondents also showed a sum of RM10,335,502 as having been drawn by Mascom from the SMKE Account. Since Mascom's entitlement was RM6,436,314.30, the table showed it as having overdrawn by RM3,899,187.70.

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[18] In para. 10 of their said affidavit the respondents averred that SMKE had sufficient funds to pay them the total sum of RM4,460,000 that they asked for since the relevant bank statement showed a balance of partnership profit in the SMKE Account of RM4,478,333.58 as at 31 May 2001.

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[19] The appellants' reply to the respondents' said paras 9.2, 9.3, 9.4 and 10 was in para 7.9 of the appellants' affidavit dated 21 September 2001 and was as follows:

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- A** As regard to paragraphs 9.2, 9.3, 9.4 and 10 of the Plaintiffs' Affidavit, I have been advised by my solicitors and verily believe that despite the facts that the total income over the period was RM70,879,071.00 and that of this income, the net profit was at RM19,308.,943.00, the Plaintiffs could not be entitled to
- B** RM6,436,314.30 respectively as against their paid disbursements of RM4,038,185.00 and RM4,023,756.00.

- [20]** It was based on the plaintiffs' said paras 9.2, 9.3 and 9.4 that Ian Chin J made a finding that there was a balance of RM2,398,123.30 for Kamawang and RM2,412,558.30 for Seri
- C** Pagi and that Mascom had overdrawn RM3,899,187.70. He said: "Those facts are not only undisputed and indisputable but being reiterated by the defendants themselves" in their said para. 7.9. In the appeal, the appellants' counsel submitted that the learned judge erred in saying that the appellants' para. 7.9 supported his
- D** findings and contended that the paragraph instead raised a dispute. In our view, while in para. 7.9 the appellants did make an attempt to raise a dispute the form of which was, however, vague, it was an attempt based on an acceptance of the figures on the basis of which the respondents worked out correctly the
- E** balance due to them.

- [21]** As to the sum of RM10,335,502 that the respondents averred the appellants had drawn, on the basis of which they and the learned judge concluded that the appellants had overdrawn by
- F** RM3,899,187.70, the appellants in their para. 7.9 were silent. It was in relation to that sum of RM10,335,502 that the question of the sum of RM2,476,019 arose. Ian Chin J had reproved the appellants for alleging that they had put moneys into the SMKE Account rather than withdrawn moneys, viewing it as an attempt
- G** made through their counsel "at twisting the event" because the allegation was not made in any affidavit. In the appeal, the question of the alleged payments by the appellants was confined to the sum of RM2,476,019, which had not been mentioned in any of the appellants' affidavits, and our attention was drawn to
- H** p. 752 of the record of appeal, Section D, which was a document entitled "Notes To The Financial Statement – 31 August 2000" and which showed a drawing by Mascom of RM2,476,019. The appellants had been granted leave to file for the appeal an affidavit by SMKE's accountant, in which he claimed that that entry was
- I** an error and that the sum was in fact a payment and not a drawing.

[22] Agreeing with the respondents' counsel, we were of the view that even if Mascom had made an advance of RM2,476,019, it did not bind the respondents and therefore could not be set up against them. This was because according to cl. 11.2.2 of the Partnership Deed the unanimous approval of all members of the Management Committee – which comprised a representative of each of the three partners – was required to enable the partnership to “borrow any money or obtain any advance or credit” or “to incur any indebtedness”. There was no such unanimous approval for the alleged advance by Mascom of RM2,476,019 and therefore Mascom made the advance, or accepted it in the name of the partnership, in breach of the Partnership Deed. The advance was prohibited by the Partnership Deed. At p. 264 of *Lindley & Banks on Partnership*, 14th edn, it is stated:

It goes almost without saying that, where authority to borrow would otherwise be implied, the firm will not be bound if borrowing is prohibited by the partnership agreement and the lender is aware of that fact.

[23] In any case, even if Mascom had made an advance of RM2,476,019 and that advance could be taken into account, it would only reduce Mascom's overdrawing of RM3,899,187.70 to RM1,423,168.70 and we could not see that fact having any effect on the balance due to the respondents.

Triable Issues Involving The Accounts

[24] This issue also related to the second appeal. The appellants' counsel submitted that no payment of profit was due to any of the partners for two reasons.

[25] The first reason was that according to cl. 7.4(b) of the JVA the division of moneys could only be done upon completion of the project but the project was, according to the appellants' counsel, completed only in 2002 whereas payment to the respondents was ordered on the basis of the accounts as at 31 August 2000.

[26] We found that reason to be without merit. It was not true that the project was completed in 2002. According to the Certificate of Practical Completion at p. 595 of the record of appeal, Section C, the project was completed on 9 November 2000. Further, cl. 7.4(b) concerned the Mascom Account,

- A** whereas it was the SMKE Account that was concerned with the payment that was ordered to be made to the respondents. The Mascom Account was the account from which the expenses and costs payable by Mascom for the project were to be paid. It was therefore understandable that the division of the balance in the
- B** account should await the completion of the project and that, as provided by cl. 7.4(c), any shortfall in the moneys in the account upon completion of the project should be made good in equal shares by the partners. But the SMKE Account was the account into which the clean profits of the partnership were to be kept,
- C** and the 28.7% represented the clean profits. There was therefore no such provision for the SMKE Account as cl. 7.4(b) for the Mascom Account.

- [27]** But even if there had been such a provision for the SMKE Account, since the respondents and Mascom had been drawing on it before the completion of the project, the provision would have been waived by common consent. As to the payment ordered to the respondents being based on the accounts as at 31 August 2000 and not as at some date after the completion of the project
- D** on 9 November 2000, it was the appellants themselves who had filed accounts up to 31 August 2000 only, whereas the respondents' summons in chambers seeking payment was filed on 20 August 2001, long after the completion of the project, and Mascom, who, as the managing partner, had control of the
- E** accounts, had ample time to produce an up to date account before the respondents' application came to be heard and, on 14 March 2003, finally decided.
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- [28]** The appellants' other reason for contending that no payment of profit was due to the respondents was that the Detailed Income Statement for the Year Ended 30 April 2002 for SMKE appearing at p. 808 of the record of appeal, Section D, showed a loss of RM912,640, and therefore the SMKE Account had no money to pay the respondents. But that was merely looking at the position for one year. The proper thing to do should have been
- G** to look at the cumulative state of the account over the years, which the appellants themselves did in Appendix I to their Skeletal Submission in the appeal, where they showed the cumulative position from the year ended 1998. The figure for each year was given, including the figure RM912,640 for the year ended 30 April
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- I** 2002. The respondents, for reasons which need not be set out

here but which are set out in paras 1.1, 1.2 and 1.3 at pp. 10 and 11 of the respondents' further submission in reply dated 11 September 2004, disputed those figures. But even if those figures were accepted, they resulted, as shown in the said Appendix I, in the cumulative position of a profit of RM17,209,791 as at 30 April 2002.

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[29] The purpose of the said Appendix I was to show by way of submission that, if the position as at 30 April 2002 were taken, the respondents, instead of having any balance due to them, had in fact overdrawn by about RM450,000 each. Aside from the respondents' dispute of the figures that was mentioned just now, there was, we found, one palpable and substantial reason why Appendix I was not reliable. Mascom was there credited with a sum of RM4,300,000 said to be "for 1st appellant absolute use" and each of the respondents was debited with a sum of RM2,150,000 (total RM4,300,000) as contribution to the sum with which Mascom was credited. Mascom was indeed given the entitlement to a sum of RM4,300,000 "for its own absolute use" by cl. 7.4(a) of the JVA but it was to be from the 71.3% paid into the Mascom Account. It was wrong to claim that sum from the respondents' share in the 28.7% paid into the SMKE Account as Appendix I sought to do. It was that error, not to mention the errors affecting the yearly figures that was mentioned just now as being disputed by the respondents, that resulted in Appendix I showing the respondents having overdrawn from the SMKE Account as at 30 April 2002. Without that error, even Appendix I would show the respondents each having at least RM1,700,000 due to them.

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[30] As the appellants failed on the two issues for the second appeal, the second appeal was also dismissed.

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[31] The dismissal of the two appeals was with costs for the respondents. We ordered that the deposits for the appeals be paid to the first respondent to account of taxed costs. We also directed that there be only one Bill of Costs for the appeals because they were heard together at one hearing.

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[32] There is another thing that we would mention. Besides Appendix I, the appellants' Skeletal Submission also had Appendix II, in which it was shown, as Mascom's admission, that Mascom had drawn RM7,859,483 from the SMKE Account. Since the first

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- A** respondent, Kamawang, had drawn RM4,038,185 and had now obtained an order for payment of another RM2,230,000 from the SMKE Account, the first respondent contended that Mascom had drawn at least RM1,591,298 more than the first respondent, who therefore invited us to invoke the court's powers under s. 69(5) of the Courts of Judicature Act 1964 and r. 7(5) of the Rules of the Court of Appeal 1994 and order Mascom to refund that sum by paying it into the SMKE Account. That we declined to do.
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